Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1996

JEFFREY THEODORE KITZE, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *Respondent.*

Petition for a Writ of Certiorari To The Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED

1. Did requiring the appellant Jeffrey Theodore Kitze to register as a sex offender under Virginia Code § 19.2-298.1 violate his rights to be free from ex post facto laws under the United States Constitution, including the fourteenth amendment, since the statute was enacted years after Mr. Kitze's offense occurred?

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CITATIONS OF REPORTS

1. Kitze v. Commonwealth, 23 Va. App. 213, 475 S.E.2d 830 (1996).

2. Supreme Court of Virginia denial of petition for appeal, dated March 5, 1997.

STATEMENT OF JURISDICTION

(i) The Virginia Court of Appeals opinion was entered on September 24, 1996. The Supreme Court of Virginia's denial of Mr. Kitze's petition for appeal was entered on March 5, 1997.

(ii) This Court has jurisdiction to hear an appeal from a state court decision in a criminal case under 28 U.S.C. § 2101(e) et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions are:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . U. S. Constitution, Fifth Amendment.

* * *

> No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U. S. Constitution, Fourteenth Amendment.

* * *

Virginia Code § 19.2-298.1 provides in pertinent part:

> Every person convicted on or after July 1, 1994, for a felony in violation of §§ 18.2-61, . . . [,rape,] . . . shall be required as a part of the

> sentence imposed upon conviction to register with the Department of State Police. The order shall also impose a duty to keep the registration current in accordance with this section.

Code § 19.2-298.1(A).

FACTS AND MATERIAL PROCEEDINGS

By order entered on September 1, 1994, and pursuant to his guilty plea, Mr. Kitze was found guilty of rape and malicious wounding of Laurie Christina Self. Over objection (see Appendix No. A), the trial court required that Mr. Kitze register as a sex offender under Virginia Code § 19.2-298.1(A), which was enacted more than five years after the offense occurred.

Mr. Kitze in the Court of Appeals raised his federal constitution objection in his questions presented, which provided in pertinent part:

> 2. Did requiring Mr. Kitze to register as a sex offender as described above violate his rights under the United States Constitution, including the fourteenth amendment?

After the conviction was affirmed by a divided opinion in the Virginia Court of Appeals (See Appendix C), Mr. Kitze then filed a petition for appeal to the Supreme Court of Virginia. His assignments of error included in pertinent part:

> 2. Requiring Mr. Kitze to register as a sex offender as described above violated his rights under the United

States Constitution, including the fourteenth amendment.

On March 5, 1997, the Supreme Court of Virginia denied Mr. Kitze's petition for appeal (See Appendix D).

ARGUMENT

1. Requiring a person to register is a substantive provision. As such, applying a statute that was enacted after the offenses occurred is a violation of Mr. Kitze's federal constitutional rights. This is especially true when the registration is incorporated into the sentence of punishment.

This case involves whether a state statute that is enacted long after the alleged offense took place can be incorporated into a sentence for a crime occurring prior to the statute's enactment. Section 19.2-298.1 provides in pertinent part:

> Every person convicted on or after July 1, 1994, for a felony in violation of §§ 18.2-61, [,rape,] shall be required <u>as a part of the sentence imposed upon conviction</u> to register with the Department of State Police. The order shall also impose a duty to keep the registration current in accordance with this section.

Code § 19.2-298.1(A) (emphasis added).

This Court has held repeatedly that the United States Constitution prohibits the retroactive application of a penal statute which disadvantages the offender

affected by such a statute. Collins v. Youngblood, 497 U.S. 37, 41 (1990); see also Weaver v. Graham, 450 U.S. 24, 29 (1981).

Requiring a person to register with police is by its nature a substantive act. It requires positive substantive acts which a person must perform after he is released from prison. Failure to register can cause the person to be reincarcerated and his parole revoked. At the time of the incident involving Ms. Self, there was no requirement that Mr. Kitze or any other person convicted of rape be required to register upon his release. To require Mr. Kitze to register now pursuant to a statute that was enacted years after the offense

occurred violates his federal and state constitutional rights and would violate the Constitution's prohibition against ex post facto laws.

The Commonwealth argued below that the retroactive registration passes constitutional muster because it is not penal. According to the Commonwealth, the registration is 1) just a law enforcement tool and 2) cannot constitute punishment because Mr. Kitze will have to register only after his release. These arguments fail for several reasons.

Contrary to the Commonwealth's argument, the registration at issue is not part of a general statute effecting all previously convicted felons generally. Rather, it is part of the

criminal procedure section of the Virginia Code and the registration requirement is expressly imposed as a part of the sentence. Section 19.2-298.1. The intent of the Virginia General Assembly is clear -- the requirement was designed to be part of a defendant's punishment and therefore is imposed as part of the sentence. That the requirement may also have other goals is irrelevant. Community service may benefit the community and fulfill a laudatory purpose, but the service imposed is still penal. Likewise, the General Assembly understood that requiring a person to continually register as a molester wherever he goes is a shaming, humiliating experience and

will naturally increase surveillance on the defendant's person. It also requires him not only to refrain from certain activities, but also to undertake repeated specified conduct (much like requiring a DUI defendant to attend ASAP). Moreover, by disseminating the information to designated others, it reduces the defendant's opportunity of employment.

The effect of the statute is to extend a part of the defendant's punishment by another fifteen years. The ultimate test is whether a lay person contemplating the commission of a crime would consider the registration requirement to be punitive and whether the registration would be seen as

increasing the quantum of possible punishment. Clearly the registration would be viewed in those terms. As such, the retroactive nature of the provision violates the Constitution.

The Commonwealth argued that § 19.2-298.1 is not penal because it takes effect only after the defendant is released from prison. The argument misses the point. If anything, that Mr. Kitze must continually register after his release increases the penal impact. It extends the length of time Mr. Kitze must labor under restrictions and must undertake specified action. As the United States Court of Appeals for the Fourth Circuit has explained, the rights of persons free from prison are higher

and more easily infringed than those who are actively incarcerated. Jones v. Murray 962 F.2d 302, cert. denied, 506 U.S. 977 (1992). (Felons who are not currently incarcerated have a constitutional right not to undergo DNA testing; their rights of privacy are greater than those in prison. Further, statutes cannot retroactively constrain liberty by delaying a person's release from prison until the person submits to testing.) Consequently, the registration cannot be justified on the ground that it is regulating conduct of an inmate. It is constraining the defendant's liberty after his release.

Mr. Kitze would note that any law enforcement benefit of registration would

not be limited to persons convicted after July 1, 1994. From a law enforcement perspective, it would be beneficial if the statute applied to all felons within the last fifteen years. However, the General Assembly understood the penal nature of the requirement. That is why the General Assembly did not impose the requirement generally on all felons past and present. In an attempt to avoid running afoul of the Constitution, the General Assembly instead purportedly imposed the registration requirement prospectively, i.e., all convictions after July 1, 1994. Unfortunately, the General Assembly erred because it misunderstood the test of retroactivity. The test is not based on the date of

sentencing, but on the date the offense occurred. But there is no logical distinction between past felons and those convicted after July 1, 1994 if the Commonwealth's "remedial" claim were the true intent of the statute. Rather, the intent of the General Assembly to punish recent criminals is apparent by the very selective nature of the statute.

Finally, the penal effect in this case is particularly onerous because Mr. Kitze had been previously convicted and sentenced prior to July 1, 1994. That sentence did not contain a registration requirement. Mr. Kitze elected to appeal that conviction and sentence based on the law that then existed, and he was not apprised that he risked having to

register as a sex offender if he pursued his right to appeal. Mr. Kitze might not have appealed had he known he would be required to register if subsequently convicted. The Commonwealth therefore cannot now impose registration on Mr. Kitze when it could not do so at the time of his first sentencing. Any other result would, at the very least, appear vindictive.

Conclusion

Wherefore, the appellant, Jeffrey Theodore Kitze, asks that the Court grant his petition for a writ of certiorari and strike all provisions in the sentencing order requiring him to register pursuant to Virginia Code §19.2-298.1. Mr. Kitze

also requests any other relief this Court deems fit and proper.

JEFREY THEODORE KITZE

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APPENDIX A

August 30, 1997

UPS NEXT DAY AIR

The Honorable David F. Berry, Judge
Albemarle Circuit Court
Albemarle County Courthouse
Court Square, 501 East Jefferson Street
Charlottesville, Virginia 22902

Re: Commonwealth v. Kitze
Indictments No. 8072-8073

Dear Judge Berry:

I am writing in regard to the sentencing order in the above-referenced matter. There are two matters that I would briefly like to address.

First, on Friday August 26, 1994, the Commonwealth suggested that the order reflect that Mr. Kitze register as a sex offender under Va. Code § 19.2-298.1. I have since reviewed the law and believe that § 19.2-298.1 is in applicable because it became law long after the date of the May, 1989 offense. Requiring a defendant to periodically register as a sex offender is a substantive provision much like parole and probation. In fact,

§ 19.2-298.1 provides that the registration is part of the sentence. To be applicable to a particular case, such a substantive provision must be in place at the time of the offense. A substantive provision cannot be imposed when it was enacted after the offense but before the date of the conviction. Otherwise, the provision would be void as being ex post facto. Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989); Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987). Consequently, Va. Code § 19.2-298.1 cannot be imposed in this case, and the defendant would object to the registry provision being incorporated into the final order.

Second, I would note that in his testimony on March 20, 1991, the author of the pre-sentence report, Thomas Leavel, amended the report. He changed the injury from serious physical injury, to physical injury (from number 2 to number 3.) See Leavel testimony pages 468-69. I would bring that change to the Court's attention in case the pre-sentence report had an impact on the Court's decision. If it did, I would ask the Court to consider the change Mr. Leavel made to the report which may not have been reflected by the Commonwealth on the report submitted on August 26, 1994.

Thank you for your consideration.

Sincerely,

(SIGNED)

William H. Shewmake

WHS/msd

CERTIFICATE

I hereby certify that a true copy of the foregoing letter was telefaxed this 30th day of August 1994, to James L. Camblos, III, Esquire, Commonwealth Attorney for Albemarle County, 410 East High Street, Charlottesville, Virginia 22902 and that a copy along with enclosures was likewise mailed on the 30th day of August, 1994 to James L. Camblos, III, Esquire, at the same address.

(SIGNED)

William H. Shewmake

APPENDIX B

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL LAW SIDE THEREOF, CONTINUED AND HELD ON **AUGUST 24, 25 & 26, 1994.**

PRESENT: HON. DAVID F. BERRY

COMMONWEALTH OF VIRGINIA
VS. INDICTMENT NO. 8072 & 8073
JEFFREY THEODORE KITZE

These days came the Attorney for the Commonwealth and the defendant, **Jeffrey Theodore Kitze**, whose date of birth is April 11, 1961, who stands indicted for two felonies, to-wit: **#8072** - On or about May 22, 1989, in the County of Albemarle, **Jeffrey Theodore Kitze**, did unlawfully, feloniously and maliciously beat, strike and wound Laurie Christina Self with intent to maim, disfigure, disable or kill; **#8073** - On or about May 22, 1994,

in the County of Albemarle, **Jeffrey Theodore Kitze**, did unlawfully and feloniously have sexual intercourse with Laurie Christina Self, against her will by force; was led to the bar of this Court in the custody of the Sheriff of this County and came also, **William Shewmake**, his attorney, assisted by **James Parkinson**, law partner of **William Shewmake**.

****

August 24, 1994

The accused having pled **Not Guilty** to the indictments on July 9, 1990, waived re-arraignment and trial by jury.

The Attorney for the Commonwealth requested trial by jury. The Attorney for the Commonwealth and counsel for the

defendant moved the Court to select one alternate juror for the trial of the jury. The Court impanelled twenty three qualified jurors, free from exception for the trial of the defendant. The Court then randomly selected three of the twenty three jurors as the panel of alternates. Whereupon the Attorney for the Commonwealth and the attorney for the defendant each alternately exercised their right to strike the names of four veniremen from the panel to arrive at a panel of twelve for the trial of the defendant. The Attorney for the Commonwealth and the attorney for the defendant each exercised their right to strike one name from the panel of three alternate jurors leaving one on the

alternate panel to serve as the alternate juror. Thereupon Judith Barnett, Steve Clements, Harriett Hague, David Jones, James L. Manley, Kay O'Connell, Peggy Pugh, Phyllis Smith, Betty Bennett, Paul Hunter, Eric McKenzie, Joseph Ullman and (alternate) Mark Doherty were duly sworn.

Due to the late hour of the day 7:20 p.m., the jury was excused until August 25, 1994, at 9:00 a.m. after admonishment from the Court to refrain from reading newspapers, listening to news accounts either on the radio or television or discussing this case with anyone. Upon the juror's departure from the Courtroom, one juror, Steve Clements, advised the Court that he could not be impartial in this case. The Court and the attorneys

questioned the juror further after which the Court excused the juror for cause. Thereupon the Court determined that the alternate juror would become one of the twelve jurors to hear the case. The Court requested that five additional names from the master jury list be called in for August 25, 1994 at 9:00 a.m. to select an alternate.

****

August 25, 1994

Court convened at 9:00 a.m. on August 25, 1994 at which time the Sheriff reported to the Court that after diligent effort only three members on the jury list could be reached to appear on short notice. Thereupon the Court questioned the three jurors and determined that one

had read a news account of this trial in the early edition of this day's newspaper. The Attorney for the Commonwealth waived his strike, the attorney for the defendant exercised his strike and the remaining juror was sworn. The Court had all members of the jury brought into the Courtroom and ascertained that no juror had heard, read or discussed anything about this case.

After opening statements, evidence was presented by the Commonwealth.

Due to the late hour of the day, the jury was excused until August 26, 1994, at 9:00 a.m. after admonishment from the Court to refrain from reading newspapers, listening to news accounts either on the

radio or television or discussing this case with anyone.

****

August 26, 1994

Court convened the trial of this case on August 26, 1994, at 9:00 a.m.

The Attorney for the Commonwealth rested h.s case at which time counsel for the defendant moved the Court to allow a recess, which motion was granted.

Upon return to the Courtroom counsel for the defendant advised the Court that the defendant wished to change his plea.

Whereupon the accused was arraigned and after private consultation with and being advised by his said counsel, pleaded **guilty** to the Indictments, which pleas were tendered by the accused in

person, and the Court, having made inquiry and being of the opinion that the accused fully understood the nature and effect of his pleas and of the penalties that may be imposed upon his conviction and of the waiver of trial by jury and of appeal, and finding that his pleas were voluntarily and intelligently made, proceeded to hear and determine the case and having heard the evidence and argument of counsel, the Court finds the defendant **GUILTY** as charged in the Indictments.

Thereupon the jury was discharged.

The Court heard extensive evidence pertaining to the sentencing of this defendant and it being demanded of the defendant if anything for himself he had

or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant be sentenced to confinement in the penitentiary of this Commonwealth for the term of ten years with five years suspended on Indictment Number 8072 and forty years with ten years suspended on Indictment No. 8073. Upon release from confinement and as conditions of the suspension, the defendant shall be of good behavior and not violate any penal laws of this Commonwealth or any of its political subdivisions for the term of fifteen years, be placed under the supervision of the Probation Officer of

this Court for the term of five years, neither possess nor consume any alcohol or illegal substances, receive any medical or psychiatric treatment deemed necessary by his Probation Officer, pay restitution which amount shall be determined by further Order of the Court, submit to random screens to detect the consumption of alcohol or illegal substances, submit to warrantless searches and seizures of his person, residence or automobile by any authorized probation officer or law enforcement officer to determine the possession of alcohol or illegal substances, have no contact whatsoever with Laurie Self and pay Court costs on an installment basis

to be paid in full prior to release from supervised probation.

It is further ORDERED, in accordance with Virginia Code Section 19.2-298.1, that the defendant register with the Sex Offender Registry of the Department of State Police within thirty days from the date of his release from incarceration and to keep the registration current in accordance with said section.

The Court certifies that at all times during the trial of this case the defendant was personally present with his attorney.

The defendant was remanded to jail to await transfer to the penitentiary.

ENTER: DAVID F. BERRY (SIGNED)

DATE: 9/1/94

APPENDIX C

COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Willis and Elder

Argued at Richmond, Virginia

JEFFREY THEODORE KITZE

OPINION BY

v. JUDGE LARRY G. ELDER

SEPTEMBER 24, 1996

Record No. 1900-94-2

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ALBERMARLE

COUNTY

David F. Berry, Judge

William H. Shewmake (Shewmake, Baronian & Parkinson, on briefs), for appellant.

H. Elizabeth Shaffer, Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

Jeffrey Theodore Kitze (appellant) appeals his convictions for rape, in violation of Code § 18.2-61, and malicious wounding, in violation of Code § 18.2-51. As part of appellant's sentence, appellant was requested to register with local law enforcement officers as a sex offender pursuant to Code § 19.2-298.1. Appellant contends that because Code § 19.2-298.1 was enacted after the offenses occurred, the

trial court violated his federal and state constitutional rights against the imposition of an ex post facto law. We disagree with appellant and affirm his convictions.

I.

FACTS

Following a trial on July 9, 1990, a jury found appellant guilty of rape and malicious wounding. The Supreme Court of Virginia reversed these convictions and remanded the case for retrial. See Kitze v. Commonwealth, 246 Va. 283, 435 S.E.2d 583 (1993). On July 1, 1994, Code § 19.2-298.1 became effective. Appellant pled guilty to both charges at his second trial on August 26, 1994. The trial court sentenced appellant to serve forty

years in prison with ten years suspended on the rape conviction, and ten years in prison with five years suspended on the malicious wounding conviction. In addition, the trial court required appellant to register with the Sex Offender Registry of the Department of State Police, in accordance with Code § 19.2-298.1.

II.

EX POST FACTO LAW

The United States Constitution, article 1, § 10, and the Virginia Constitution, article 1, § 9, prohibit the Commonwealth from enacting ex post facto laws. These constitutional prohibitions on ex post facto laws apply only to statutes that impose penalties,

Collins v. Youngblood, 497 U.S. 37, 41 (1990), or where the challenged change in the law "alters the definition of criminal conduct." California Dept. of Corrections v. Morales, __ U.S. __, __ n.3, 115 S. Ct. 1597, 1602 n.3 (1995).

> In deciding whether or not a law is penal, [the United States Supreme] Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment--that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature.

Trop v. Dulles, 356 U.S. 86, 96 (1958)(plurality opinion) (footnotes omitted); Snyder v. State, 912 P.2d 1127, 1130 (Wyo. 1996)(holding that registration of sex offenders under the Wyoming Sex Offenders Registration Act does not offend the prohibition against ex post facto laws).

The statutory scheme under which appellant was required to register as a sex offender creates a Sex Offender Registry in the Commonwealth. The purpose of the Registry is:

> to assist the efforts of law-enforcement agencies to protect their communities from repeat sex offenders and to protect children from becoming the victims of repeat sex offenders by helping to prevent such individuals from being hired or allowed to volunteer to work directly with children.

Code § 19.2-390.1(A). Every person convicted on or after July 1, 1994, of a sex crime such as rape is required to register with the Department of State Police within thirty days from release from confinement. Code § 19.2-298.1(A). A knowing and intentional failure to register is punishable as a Class 1 misdemeanor, Code § 19.2-298.1(E), and could expose the sex offender to contempt of court charges for failure to abide by the Commonwealth's laws during a period of suspension.

We hold that the sex offender registration requirement is not penal and that the General Assembly "intended to facilitate" law enforcement and protection of children. There was no

intent to inflict greater punishment [on the convicted sex offender]." Snyder, 912 P.2d at 1131. Protecting the public and preventing crimes are regulatory, not punitive, purposes. Artway v. New Jersey, 81 F.3d 1235, 1264 (3d Cir. 1996)(citing De Veau v. Braisted, 363 U.S. 144, 160 (1960)).

> Here, the solely remedial purpose of helping law enforcement agencies keep tabs on these offenders fully explains requiring certain sex offenders to register. Registration may allow officers to prevent future crimes by intervening in dangerous situations. Like the agent who must endure the snow to fetch the soupmeat, the registrant may face some unpleasantness from having to register and update his registration. But the remedial purpose of knowing the whereabouts of sex offenders fully explains the registration provision just as the need for dinner fully explains a trip out into the night. And the means chosen--registration and law

> enforcement notification only--is not excessive in any way. Registration, therefore, is certainly "reasonably related" to a legitimate goal: allowing law enforcement to stay vigilant against possible re-abuse.

Artway, 81 F.3d. at 1265.

Other states considering this issue have reached the same result. For example, the Court of Appeals of Minnesota recently concluded "that [Minnesota's sex offender] registration statute does not impose an affirmative disability, has not historically been viewed as punishment, and does not advance the traditional aims of punishment." State v. Manning, 532 N.W.2d 244, 248 (Minn. Ct. App. 1995). Similarly, the Supreme Court of New Hampshire held that "the [New Hampshire]

sexual offender registration [requirement] inflicts no greater punishment" upon the sex offender and does not violate ex post facto principles. State v. Costello, 643 A.2d 531, 534 (N.H. 1994). In State v. Ward, 869 P.2d 1062, 1068, 1074 (Wash. 1994)(en banc), the Supreme Court of Washington held that both the purpose and effect of Washington's sex offender registration requirement were not punitive. See also Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (holding that New Jersey's sex offender registration requirement had a totally remedial purpose); People v. Adams, 581 N.E.2d 637 (Ill. 1991)(holding that Illinois' sex offender registration

requirement does not constitute punishment).

While registration might impose a burden on a convicted sex offender, registration is merely a remedial aspect of a sex offender's sentence. As the Supreme Court of New Jersey held:

> [t]he fact that some deterrent punitive impact may result, does not . . . transform [sex offender registration] provisions into "punishment" if that impact is an inevitable consequence of the regulatory provision, as distinguished from an impact that results from "excessive" provisions, provisions that do not advance the regulatory purpose.

Poritz, 662 A.2d at 405 (footnote omitted). Any potential punishment arising from the sex offender's failure to register is prospective and does not

punish him or her for past criminal activity. See Jones v. Murray, 962 F.2d 302, 310 n.3 (4th Cir.), cert. denied, 506 U.S. 977 (1992).[1]

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[1]The Fourth Circuit Court of Appeals held in Jones, with regard to sanctions for failure to provide a DNA sample:

> Suffice it to say that whatever punishment or disadvantagement is imposed results, not by reason of conduct that took place before enactment of the statute, so as to become retrospective, but from conduct that occurred after enactment in refusing to comply with a reasonable regulation.

Jones, 962 F.2d at 310 n. 10.

Furthermore:

> [t]he mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the

Similarly, a potential contempt violation for failure to abide by the trial court's sentencing order, which could lead to a reimposition of any suspended jail time and a revocation of parole and probation rights, is prospective. In Costello, the defendant was prosecuted for violating the terms of his probation by failing to register as a sex offender. The Supreme Court of New Hampshire stated:

> [T]he defendant's argument with

> legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation . . . .

Snyder, 912 P.2d at 1131 (citing De Veau, 363 U.S. at 160).

> respect to the added burden he suffers is that he is being prosecuted for an act (not registering) that was not illegal when he submitted the underlying sexual assault. This misconstrues the appropriate ex post facto analysis. In fact, the defendant is being prosecuted for an act, failure to register, that was itself an offense when the defendant committed it, which presents no problems of retrospectivity.

Costello, 643 A.2d at 533.

Most of the cases discussed above involve situations where the registration requirement was not imposed as part of the defendant's sentence, but rather was imposed subsequently.[2] This does not alter our analysis of whether the

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[2]Other state statutes allow a court to impose the registration requirement retroactively, after the sex offender's original sentence is imposed. See, e.g., N.J. Stat. Ann. § 2C:7-b(1)(West 1995); Wash. Rev. Code § 9A:44.130(West 1995)

registration requirement constitutes punishment. Merely because a trial court imposes the registration requirement as part of a sentence does not convert a non-punitive statute into a punitive statute. For example, in People v. Starnes, 653 N.E.2d 4 (Ill. App. Ct.), appeal denied, 657 N.E.2d 635 (1995), the trial court's sentencing order required the defendant to register as a first-time sex offender, even though at the time of the offense, Illinois required only second-time sex offenders to register. The Illinois Court of Appeals rejected the defendant's ex post facto argument, holding that the registration requirement did not constitute punishment, even where

it was imposed as part of the defendant's sentence. Id. at 6.

For these reasons, we hold that the sex offender registration requirement does not violate the constitutional prohibitions against ex post facto laws. We therefore affirm appellant's convictions.

Affirmed.

Benton, J., dissenting.

The issue in this case is not complicated. The evidence proved that Jeffrey Theodore Kitze committed acts in 1989 that led to indictments for rape and malicious wounding. At that time, Code § 19.2-298.1 had not been enacted. Kitze was tried in 1990 and convicted of rape and malicious wounding. His convictions

were reversed on appeal and remanded for a new trial. See Kitze v. Commonwealth, 246 Va. 283, 435 S.E.2d 583 (1993). At that time, Code § 19.2-298.1 had not been enacted.

On remand and during the course of the new trial in August 1994, Kitze pled guilty to both charges. Prior to the commencement of the second trial, Code § 19.2-298.1 became effective. In pertinent part, the statute reads as follows:

> Every person convicted on or after July 1, 1994, for a felony in violation of §§ 18.2-61, [,rape,] shall be required as a part of the sentence imposed upon conviction to register with the Department of State Police. The order shall also impose a duty to keep the registration current in accordance with this section.

Code § 19.2-298.1(A) (emphasis added).

In sentencing Kitze upon his plea of guilty, the trial judge's order stated that "[i]t is further ORDERED, in accordance with Virginia Code Section 19.2-298.1, that the defendant register with the Sex Offender Registry of the Department of State Police within thirty days from the date of his release from incarceration and to keep the registration current in accordance with said section." This statutorily mandated penalty did not exist as an aspect of sentencing when Kitze committed the criminal offenses.

The Constitution of the United States provides that "[n]o State shall

. . . pass any . . . ex post facto Law." Art. I, § 10. "It is settled, by decisions of . . . [the Supreme] Court . . ., that any statute . . . which makes more burdensome the punishment for a crime, after its commission, . . . is prohibited as ex post facto." Beazell v. Ohio, 269 U.S. 167, 169-70 (1925). "[T]he Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' [;thus,] it has long been recognized by . . . [the Supreme] Court that the constitutional prohibition on ex post facto laws applies . . . to penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41 (1990). "[T]wo critical elements must be present

for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). Thus, the Constitutional prohibition against ex post facto laws "forbids the application of any new punitive measure to a crime already consummated." Lindsey v. Washington, 301 U.S. 397, 401 (1937).

The Constitution of Virginia also mandates "that the General Assembly shall not pass . . . any ex post facto law." Art. I, § 9. The following principle was stated long ago by the Supreme Court of Appeals of Virginia:

> [T]he phrase ex post facto law, as used in the constitution, is

> . . . applicable . . . to criminal and penal laws, which impose a punishment for previous acts which were not punishable at all when committed, or not punishable to the extent or in the manner prescribed. So that ex post facto laws relate to penal and criminal proceedings which inflict punishment or forfeitures.

Town of Danville v. Pace, 25 Gratt. (66 Va.) 1, 9 (1874).

In this case, the trial judge ordered "as a part of the sentence imposed upon [Kitze's] conviction" that Kitze register with the State Police and maintain a current registration. I believe that the sentencing requirement, mandated by Code § 19.2-298.1(A), is penal in character and is an ex post facto law when applied to persons who committed offenses prior to July 1, 1994. "The critical question . . . is whether

the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence." Weaver, 450 U.S. at 32 n.17. Code § 19.2-298.1(A) requires the sentencing judge to order registration as an incident of conviction. The statutory requirement imposes a burden only by virtue of the felony conviction, and it "makes more onerous the punishment for crimes committed before its enactment." Id. at 36. Registration as a sex offender is a mandatory requirement to be imposed by the sentencing judge following each felony conviction, and it may be enforced by criminal contempt or by any other power available to the criminal process.

In an early case, the United States Supreme Court stated that the "deprivation of any rights, civil or political, previously enjoyed, may be punishment." Cummings v. Missouri, 71 U.S. 277, 320 (1867). Indeed, state imposed "registration has traditionally been viewed as punitive." State v. Noble, 829 P.2d 1217, 1222 (Ariz. 1992). See also State v. Payne, 633 So. 2d 701, 703 (La. App. 1993), cert. denied, 637 So. 2d 497 (La. 1994).

The constitutional prohibition against ex post facto laws extends to all penalties and punishments; it does not apply to terms of imprisonment. Any changes in the law which infringe upon "substantial personal rights" are ex post

facto violations. Malloy v. South Carolina, 237 U.S. 180, 183 (1915). Indeed, insubstantial changes in fines and other penalties imposed at sentencing have been found to be violative of the prohibition against ex post facto laws. See Matter of Appeal in Maricopa County Juv. Action, 677 P.2d 943, 946 (Ariz. App. 1984)(Statute disadvantages an offender and therefore violates the constitutional prohibitions against ex post facto laws when it requires Court to levy a "rehabilitati[ve] . . . monetary assessment" not in effect at the time the offense was committed); Eichelberger v. State, 916 S.W.2d 109, 112 (Ark. 1996) (retroactive increase in restitution requirements violated prohibitions

against ex post facto laws); People v. Rayburn, 630 N.E.2d 533, 538 (Ill. App. 1994)(statute requiring levy of mandatory assessment for the family abuse fund under conviction was an ex post facto increase in punishment); State v. Kaster, 469 N.W.2d 671, 673-74 (Iowa 1991)(ten dollar increase in a civil damages assessment that was required to be levied upon a person convicted of unlawfully taking fish was a prohibited ex post facto enhancement of punishment); State v. Short, 350 S.E.2d 1, 2 (W. Va. 1986)(change in statute after date of offense that granted the ability to enforce an order of restitution beyond the period of probation violated the prohibition against ex post facto laws).

Citing People v. Starnes, 653 N.E.2d 4 (Ill. App. Ct.), appeal denied, 657 N.E.2d 635 (1995), the majority rules that registration requirement is not punishment when imposed as a part of a criminal sentence. Starnes, held, however, "that defendant has waived his constitutional challenge." 653 N.E.2d at 6. The portion of the opinion relied upon by the majority is pure dicta.

Furthermore, I disagree with the majority's view that "registration is merely a remedial aspect of a sex offender's sentence." While registration may serve a remedial purpose under certain circumstances, when it is imposed as a requirement of a felony sentencing order it also "disadvantage[s] the

offender," as does requiring the defendant to pay fines or restitution, Weaver, 450 U.S. at 29, and therefore, constitutes punishment. Thus, applying Code § 19.2-298.1 retroactively to Kitze increased his punishment and violated the ex post facto clause.

By extending the scope of Code § 19.2-298.1(A) to persons convicted on or after July 1, 1994, for a proscribed felony committed before July 1, 1994 (the effective date of the act), the General Assembly enacted an ex post facto law. As to Kitze, the imposition of that requirement is a punishment for a past criminal act.

For the foregoing reasons, I would hold that the statute's application to

Kitze is unconstitutional as a violation of the ex post facto clauses of both the United States and Virginia Constitutions.

APPENDIX D

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON Wednesday the 5th day of March, 1997.

Jeffrey Theodore Kitze,

Appellant,

against Record No. 962128

Court of Appeals No. 1900-94-2

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Koontz took no part in the consideration of this case.

A Copy,
Teste:
David B. Beach, Clerk
By: Jennifer G. Earl
(SIGNED)
Deputy Clerk